Supreme Court, U.S.
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No. 07-995

In The
Supreme Court of the United States

STEVE SANDERS,
individually and as class representative
Petitioner,

v.

EDMUND G. BROWN, in his official capacity as Attorney general of the State of California, PHILIP MORRIS USA, INC., R.J. REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., and LORILLARD TOBACCO CO.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves an antitrust challenge to the so-called Master Settlement Agreement ("MSA") between the four major tobacco companies and 46 States, and legislation enacted to implement the agreement. The questions presented are:

1. Whether the Ninth Circuit erred in holding, in conflict with the Second Circuit, that the MSA implementing statutes are not pre-empted by the Sherman Antitrust Act?

2. Whether the Ninth Circuit erred in holding, in conflict with the Second Circuit, that the *Noerr-Pennington* doctrine applies not only to protect petitioning activity, but also to immunize any resulting anticompetitive legislation and conduct undertaken pursuant thereto, regardless whether the legislation fails to qualify for protection from federal pre-emption under the state-action doctrine?

3. Whether the Ninth Circuit erred in holding, in conflict with the Second and Third Circuits, that the *Parker* state-action immunity doctrine applies to the conduct of a state executive officer in entering into a settlement agreement and administering state laws that together are part of an anticompetitive scheme, regardless whether such settlement and laws would satisfy the *Midcal* test for state-action immunity?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Steve Sanders was the appellant in the Ninth Circuit and the plaintiff in the district court.

Respondent Edmund G. Brown, as Attorney General of the State of California, was substituted as an appellee below when he replaced his predecessor, Bill Lockyer, as Attorney General. Former Attorney General Lockyer was initially an appellee in the Ninth Circuit and was a defendant in the district court.

Respondents Phillip Morris USA, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. were each appellees in the Ninth Circuit and were each defendants in the district court. Each defendant, respectively, is ultimately owned by the following publicly held company: Altria Group, Inc., Reynolds American Inc., British American Tobacco, p.l.c., and Loews Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steve Sanders respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California is published at 365 F. Supp.2d 1093 and is attached as Appendix B (pages B1-B23). The decision of the Ninth Circuit is published at 504 F.3d 903 and is attached as Appendix A (pages A1-A31).

JURISDICTION

The Ninth Circuit issued its opinion on September 26, 2007. Justice Kennedy granted petitioner an extension of time to file this petition through January 25, 2008. This Court has jurisdiction pursuant to 23 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * is declared to be illegal." 15 U.S.C. § 1.

California's so-called Qualifying Act, also sometimes referred to as the Escrow Statute, provides in relevant part:

> (a) Any tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, after the date of enactment of this article shall do one of the following:

(1) Become a participating manufacturer as that term is defined in Section II(jj) of the Master Settlement Agreement and generally perform its financial obligations under the Master Settlement Agreement; or

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts, as such amounts are adjusted for inflation:

[Setting forth amounts per unit sold beginning at $0.0094241 for 1999 and rising to $0.0188482 for 2007 and thereafter.]

(b) Any tobacco product manufacturer that places funds into escrow pursuant to paragraph (2) of subdivision (a) shall receive the interest or other appreciation on the funds as earned. The funds, other than the interest or other appreciation, shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim brought against that tobacco product manufacturer by the state or any releasing party located or residing in the state. * * *

(2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in this state in a particular year was greater than the Master Settlement Agreement payments * * * that the manufacturer would have been required to make on account of the units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to that tobacco product manufacturer; or

> (3) To the extent not released from escrow under paragraph (1) or (2) of subdivision (b), funds shall be released from escrow and revert back to the tobacco product manufacturer 25 years after the date on which they were placed into escrow. * * *

CAL. HEALTH & SAFETY CODE § 104557.

California's so-called Contraband Amendment provides, in relevant part:

> (a) Commencing on January 1, 2004, every manufacturer and every importer, as defined in subdivision (b) of Section 22971, shall obtain and maintain a license to engage in the sale of cigarettes. * * *
>
> (b) In order to be eligible for obtaining and maintaining a license under this division, a manufacturer or importer that is a "tobacco product manufacturer" in subdivision (i) of Section 104556 of the Health and Safety Code, shall do all of the following in the manner specified by the board:
>
> (1) Certify to the board that it is a "participating manufacturer" as defined in subsection II(jj) of the "Master Settlement Agreement" (MSA), or is in full compliance with paragraph (2) of subdivision (a) of Section 104557 of the Health and Safety Code [the Escrow Statute]. * * *

CAL. BUS. & PROF. CODE § 22979.

STATEMENT OF THE CASE

This case involves an antitrust challenge to the actions of the four major tobacco companies and the State of California under the so-called Master Settlement Agreement ("MSA") negotiated between the

major tobacco companies and 46 States. The MSA was proposed by the major tobacco companies, known under the MSA as the "Original Participating Manufacturers" or "OPMs," to settle suits brought against them by various state attorneys general. Under the MSA, the OPMs agreed to pay the settling States more than $ 200 billion over the next 25 years and to various restrictions on their conduct. The States, in turn, agreed to drop their suits against the OPMs and not to sue them for tobacco sales in the future. Up to that point, the MSA had few antitrust implications.

As proposed by the OPMs, however, and accepted by the state attorneys general, the MSA in fact included provisions designed not only to ensure that the settling manufacturers would be able to pass the full cost of the settlement on to consumers, but also to insulate the defendants from any competitive disadvantage they might face at the hands of their rivals as a result of having raised prices to pay for the settlement. The agreement thus imposed severe disincentives upon any attempt by the OPMs to increase their market share or to compete on price among themselves. In addition, the agreement sought to prevent other tobacco manufacturers from gaining market share at the OPMs' expense as a result of the expected rise in prices. It encouraged other manufacturers to join the settlement as "Subsequent Participating Manufacturers" or "SPMs" by exempting them from any settlement payment obligations if they kept their market share below certain fixed levels. For those companies that refused to join the settlement, the MSA required the States to enact legislation requiring those "Non Participating Manufacturers" or

"NPMs," to pay into state escrow accounts an amount equivalent to the increase in prices the OPMs anticipated having to impose to pay for the settlement, effectively precluding the NPMs from gaining market share based on the anticipated price increases. *See* App. A4-A6.

The result was an agreement among competitors and with state attorneys general to divide the market for tobacco products among participating manufacturers while promoting lockstep price increases and protecting such participating manufacturers by imposing substantial additional costs on potential competitors who were never sued and did not join the settlement.

As alleged in the Complaint, the scheme has in fact worked as the OPMs intended. Following the adoption of the MSA, the OPMs raised their prices by more than $12.20 per carton between 1998 and 2002, generating increased profits of approximately $20 billion per year; more than double that needed to fund their MSA obligations. App. A7. Such price increases have occurred in lockstep and the OPMs and SPMs have not lost any material amount of market share as a result. *Id.*

1. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, declares that "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce" is illegal. As between private parties, it is well settled that a "horizontal" contract, combination, or conspiracy among competitors to raise prices, divide markets, restrict output, or otherwise to suppress competition is *per se* illegal. *See United States* v. *Topco Assocs.*, 405 U.S. 596, 608 (1972) ("one of the

classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint * * *"); *NAACP* v. *Board of Regents*, 468 U.S. 85, 100, 107-08 (1984) ("Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach * * *"; "Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."). Were the MSA solely an agreement between the tobacco companies themselves, there is no doubt that it would constitute a *per se* violation of the Sherman Act and that tobacco company "executives would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines." *Freedom Holdings Inc.* v. *Spitzer*, 357 F.3d 205, 226 (CA2 2004) ("*Freedom Holdings I*").

These general principles are, however, subject to various judicially-developed limitations. First, this Court has held that, in enacting the Sherman Act, Congress did not suggest any purpose "to restrain a state or its officers or agents from activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943). Relying on principles of federalism and state sovereignty, this Court declined to attribute to Congress, via the Sherman Act, "an unexpressed purpose to nullify a state's control over its officers and agents." *Id.* at 351. Accordingly, under the so-called *Parker* immunity doctrine, this Court has held that the antitrust laws do not apply to a State acting in its sovereign capacity, either through its legislature or

through its state supreme court exercising legislative authority. *Id.* at 350-51 (applying doctrine to "activities directed by [a State's] legislature"); *Hoover* v. *Ronwin,* 466 U.S. 558, 568 (1984) ("[A] state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action.").

Even state action, however, may nonetheless be subject to the Sherman Act if the State acts as a "participant in a private agreement or combination by others for restraint of trade," or when a state seeks to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351-52. Similarly, a "hybrid restraint," under which a statute "contemplates a private market decision but provides a nonmarket mechanism for enforcing the decision" requires a different analysis than a purely public regulatory scheme, and its validity under the Sherman Act will typically depend on the degree to which the private decisions are supervised by the State. *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 665-66 (1982) (Stevens, J., concurring in the judgment).

Regarding any subsequent anticompetitive conduct supposedly pursuant to state law, *Parker* state-action immunity only extends to such conduct where the challenged restraint is "'one clearly articulated and affirmatively expressed as state policy' [and] the policy [is] 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n.* v. *Midcal Alumi-*

num, Inc., 445 U.S. 97, 105 (1980) (citation omitted). A state program failing the so-called *Midcal* test, and merely enforcing or casting "a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement," *id.* at 106, not only will fail to provide immunity for such conduct, it may itself be enjoined as contrary to the Sherman Act, *id.* at 101-02 (affirming injunction barring state department from enforcing wine pricing statutes).

Second, the Court has held, in light of both the *Parker* state-action doctrine and the First Amendment's right to petition the government, that private entities may not be held liable for "activities [that] comprise[] mere solicitation of governmental action with respect to the passage and enforcement of laws." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670 (1965) ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."). The protection for such petitioning in the antitrust context is known as the *Noerr-Pennington* doctrine.

2. On June 9, 2004, plaintiff Steve Sanders, a smoker, filed suit on behalf of himself and as putative class representative of similarly situated smokers, alleging that the MSA, the California implementing statutes, and the tobacco companies' ensuing conduct violated, *inter alia*, federal antitrust laws. Class Action Complaint, June 9, 2004 ("Complaint") [ER 001-

025.][1] The Complaint sought declaratory and injunctive relief against the California Attorney General and the OPMs, and also sought damages and restitution from the OPMs.

As was alleged in the Complaint, in 1997 several States sued the four major tobacco companies, respondents here, to recover costs to the States associated with smoking-related illnesses. In response to those suits, the tobacco defendants together formulated, and thereafter proposed to the state attorneys general, a settlement whereby the companies would pay over $200 billion to the States over the next 25 years and agree to various marketing restrictions.

Agreeing to pay the States billions of dollars gave rise to an obvious problem for the defendants. If they maintained their current prices, the MSA payments would substantially erode (and perhaps eliminate) their profits for the next 25 years. On the other hand, if they raised their prices to pay for the settlement, the price increases would put them at a disadvantage vis-à-vis their competitors. The OPMs solved this problem in three ways.

First, they structured their payment obligations under the MSA in a way that strongly discouraged any of the OPMs from seeking to gain market share at each others' expense. In particular, the OPMs agreed and proposed to allocate payment of the an-

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[1] "ER" refers to the Excerpts of Record in the court of appeals. The complaint also alleged violations of state antitrust and unfair competition laws. Those claims, while not directly relevant to the current petition, were disposed of on grounds dependant on the federal antitrust ruling, and thus would, at least at this stage, follow the fate of the federal issues presented here.

nual settlement amounts according to *future* annual market share rather than according to any measure of past conduct or market share. App. A5; MSA § IX(c)(1).[2] Under such allocation method, any OPM gaining future market share would bear a concomitant increase in MSA payment obligations, and any OPM losing relative market share would be compensated by a decrease in MSA payments. App. A5. The Complaint alleged that such payment adjustments would offset any potential gain in profits from a gain in market share. Complaint ¶ 21 [ER 008-009].

Second, the OPMs encouraged other manufacturers to join the MSA as SPMs, and to forgo attempting to gain market share at the OPMs' expense, by offering an exemption from all MSA payments for SPMs who joined promptly and who kept their market share at or below either their 1998 levels or 125% of their 1997 levels, whichever was higher. App. A4-A5; MSA § IX(i). For sales above that level, SPMs would have to pay a portion of the MSA payment. *Id.*

Third, the OPMs guarded against price competition by manufacturers who declined to join the MSA – "Non-Participating Manufacturers" or "NPMs" – by enlisting the States to impose added costs upon such NPMs that would equal (and in reality exceed) the per-cigarette costs of the settlement payments by the OPMs. *See* App. A5-A7; MSA § IX(d). The MSA does this by threatening to reduce or withhold settlement payments to any State that does not enact a so-called Qualifying Statute designed to eliminate any com-

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[2] The MSA and related documentation is available at online at www.naag.org/backpages/naag/tobacco/msa/.

petitive threat the NPMs, with their lower cost structure, might pose to the participating manufacturers. *Id.* Given the draconian penalty for failure to enact and diligently enforce a qualifying statute, virtually all MSA States, including California, have adopted such a statute.

California's Qualifying Act, also sometimes known as the Escrow Statute, is typical, and provides that any manufacturer not participating in the MSA must pay into escrow an amount per cigarette approximately equal to the per cigarette amount paid by the OPMs under the MSA. App. A7; CAL. HEALTH & SAFETY CODE § 104557. Such amounts are to remain in escrow for 25 years unless used to pay any future liability to the State. Unlike MSA payments, however, the escrow payments are not tax deductible, hence their real cost to NPMs is considerably higher than the cost of MSA payments to the OPMs. Complaint ¶ 27(d) [ER 013]. The differential tax treatment of escrow payments and MSA payments thus not only eliminates any competitive disadvantage from the MSA payments, it actually gives participating manufacturers a competitive cost *advantage* that allows them to increase prices well beyond that needed to fund the MSA and still be protected from price competition by the NPMs.

The Qualifying Act is further enforced by the Contraband Amendment, which requires all companies to obtain a license to sell cigarettes within California, and denies a license to any company that does not either join the MSA or make escrow payments. *See* App. A6-A7; CAL. BUS. & PROF. CODE § 22979.

Through a combination of those three elements – OPM payments based on future market share that deter gains in market share, incentives for SPMs to maintain market share at or below fixed levels, and imposition of added costs on NPMs that precluded price competition even well above price levels necessary to fund the MSA – the OPMs effectively established a horizontal output cartel that eliminated all incentive to increase market share or to compete on price, locking in market share and dividing the market among the OPMs, who together account for over 90% of the national cigarette market, *see* App. A3. The scheme likewise drew in numerous SPMs who, together with the OPMs, raised the total market share represented by MSA participants to 96%. App. B3.

Such a market division scheme also created an irresistible pressure upon each OPM to match any price increases by the others in order to avoid financially counterproductive gains in relative market share and to reap supracompetitive profits in the relatively inelastic cigarette market. For example, under the MSA an OPMs' failure to adopt a price increase initiated by one or more of the other OPMs would lead to the lower-priced OPM gaining market share and hence shouldering a larger percentage of the fixed MSA costs. *See* App. A5. The higher-priced OPMs, by contrast, would lose some market share, but they would both have a higher profit margin on the cigarettes they did sell and would pay less of the MSA payments. If all of the OPMs act together, however, none of them would gain or lose market share, they would all have a higher profit margin, and each

OPMs MSA payments would remain the same but constitute a smaller percentage of revenues. The system as designed thus penalizes gains in market share and rewards the maintenance of existing market shares at higher prices.[3]

In a testament to the anticompetitive effectiveness of the MSA, and as alleged in the Complaint, despite price increases of more than $12.20 per carton of cigarettes, generating more than twice the additional profits needed to fund the MSA, the market shares of participating manufacturers have not materially changed since the MSA was adopted. *See* App. A7.

Based upon the foregoing agreements, statutes, and the subsequent conduct of the OPMs in raising prices in lockstep and beyond that necessary to fund their MSA payments, the Complaint alleges the existence of a market-division, output-restriction and price-fixing cartel facilitated and enforced, though not actively supervised, by the State.

3. In response to the Complaint, the tobacco company defendants and the California Attorney General moved to dismiss, relying primarily on the *Noerr-Pennington* and *Parker* immunity doctrines.

4. On March 28, 2005, the district court granted defendants' motions to dismiss. The court concluded that the MSA, the Qualifying Act, and the Contraband Amendment were all protected by the *Parker* state-action doctrine because the MSA was "a sover-

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[3] The incentives are similar for SPMs, who avoid any MSA payments, and increase their profit margin, by tracking the price increases of the OPMs and keeping their market share below the fixed levels specified by the MSA.

eign act of the state of California" and the implementing statutes were "direct legislative activity." App. B11 (citing *Parker* and *Hoover*). The court rejected plaintiff's argument that it apply the two-part test from *Midcal* to determine whether the State had affirmatively expressed and actively supervised its supposed decision to supplant competition, and further held that the MSA and its related statutes were not a "hybrid restraint" disqualified from *Parker* immunity. App. B9-14. In doing so, the court rejected the contrary holding of the Second Circuit in *Freedom Holdings I,* 357 F.3d at 233, that the MSA and its related statutes were a hybrid restraint that failed the *Midcal* test and were preempted. App. B13-14.

The district court also found that the Qualifying Act and the Contraband Amendment were not facially preempted by federal law because the statutes themselves did not expressly permit violations of the antitrust laws and because, in its view, the alleged effects of the statutes in enforcing an anticompetitive scheme were merely hypothetical or potential. App. B14-B16.

As to both the Attorney General and the tobacco defendants, the court held they were immune under the *Noerr-Pennington* doctrine not only for their conduct in negotiating and seeking approval of the MSA, but also for the *results* of such petitioning and their subsequent conduct under the regime established by the MSA and its related statutes. App. B16-B20.

Finally, the district court also extended *Parker* state-action immunity to the tobacco defendants, refusing to apply the *Midcal* test or to find that the MSA arrangement was a hybrid restraint, and con-

cluding that where "there is direct state action affording immunity, the immunity extends equally to private parties and state actors." App. B21. The court rejected the Third Circuit's conclusion in *A.D. Bedell Wholesale Co.* v. *Philip Morris, Inc.*, 263 F.3d 239 (CA3 2001), *cert. denied*, 534 U.S. 1081 (2002) that the *Midcal* analysis applied to the MSA and prevented state-action immunity from extending to tobacco company conduct *after* implementation of the MSA. App. B22.[4]

5. Plaintiff appealed to the Ninth Circuit.

6. On September 26, 2007, the Ninth Circuit affirmed. App. A1-A31.

a. Before the Ninth Circuit, plaintiff argued that the MSA and its related statutes establish an output and price-fixing cartel that is a *per se* antitrust violation, not merely some hypothetical or potential violation, and were not saved from preemption by this Court's decision in *Rice*.

In *Rice*, this Court held that a state statute is preempted by federal antitrust law "on its face without consideration of particular circumstances," only

> if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

---

[4] Regarding the state-law claims, the court found that the legislative acts of the state cannot violate its own laws. App. B23. It did not discuss whether the MSA or the conduct of the tobacco defendants under the MSA could violate such law, though it granted the motion to dismiss on those claims in any event.

> Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

458 U.S. at 658 n. 4, 661. Plaintiff argued that the MSA and the statutes established an output cartel that was a *per se* violation of the Sherman Act and hence were preempted.

The Ninth Circuit disagreed. It held that the Escrow and Contraband statutes were not preempted because, in its view, the statutes do not "explicitly allow price fixing, market division, or other *per se* monopolistic behavior," and an NPM still "conceivably could compete on price by charging a 'normal' price and still make a 'normal' profit, even taking the escrow payment into account." App. A13. The court thus concluded that the statutes do not "mandate or authorize conduct that 'in all cases' violates federal antitrust law," and hence were not preempted. *Id.* (quoting *Fisher* v. *City of Berkeley*, 475 U.S. 260, 265 (1986) (quoting *Rice*, 458 U.S. at 661)) (internal quotation marks omitted in opinion below).

In so holding, the court below joined the Sixth Circuit in finding that the law was not preempted, *Trident Int'l Corp.* v. *Kentucky*, 467 F.3d 547, 557-58 (CA6 2006), and expressly rejected the Second Circuit's contrary finding of preemption in *Freedom Holdings I*, 357 F.3d at 222-32.

b. Plaintiff also challenged the application of *Noerr-Pennington* immunity to protect the MSA, its related statutes, or the subsequent conduct of the tobacco companies in using the MSA regime to operate a cartel. As described by one of the leading treatises on antitrust law, "*Noerr* protects the petitioning proc-

ess from antitrust liability, but it does not protect all the results of such petitioning." 1 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 229, at 40 (2005 Supp.). And, as a plurality of this Court wrote in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976), *Noerr* "did not involve any question of either liability or exemption for private action taken in compliance with state law. * * * [N]othing in the *Noerr* opinion implies that the mere fact that a * * * regulatory agency may approve a proposal * * * is a sufficient reason for conferring antitrust immunity on the proposed conduct."

The court of appeals nonetheless agreed with the district court and held that the tobacco company defendants were immune under the *Noerr-Pennington* doctrine not only for their actions in negotiating and seeking court approval of the MSA, but also for their subsequent, non-petitioning conduct under the regime established by the MSA and its related statutes. App. A15. The court acknowledged that the plurality and concurring opinions in *Cantor* suggested that there was no *Noerr-Pennington* immunity for subsequent anticompetitive conduct, even if approved or required by a State, but questioned the precedential value of those opinions. App. A18-A20. Instead, the Ninth Circuit looked to its own and Fifth Circuit precedent to limit *Cantor* and conclude that private parties can indeed be immunized for post-petitioning conduct and not merely for the act of petitioning itself. App. A19-A20.

Erroneously viewing the injuries in this case as stemming exclusively from the state statutes, and ignoring the tobacco companies' coordinated price in-

creases beyond that required to fund the MSA, the court held that the *Noerr-Pennington* doctrine was dispositive of the claims against the private defendants. App. A20-A21. The court recognized that such holding was in tension with the holding of the Second Circuit in *Freedom Holdings I* that the MSA implementing statutes themselves were not protected from preemption by *Noerr-Pennington* immunity, but claimed that defendants were not seeking immunity for the statutes *per se*, merely for their conduct pursuant to or consistent with such statutes. App. A21 n. 9.

c. Regarding the claims against the state Attorney General, the court found that *Parker* state-action immunity applied both to the act of entering into the MSA and to the adoption and enforcement of the related statutes. Entry into the MSA, said the court, qualified as "state action" for *Parker* purposes notwithstanding that the MSA was first devised among the private defendants and only then brought to the state attorneys general for approval of the scheme. App. A21-A23. The court further held that, being "sovereign" state action, neither the MSA nor the related statutes were subject to the *Midcal* requirements of clear articulation and active supervision, but were instead entitled to supposed absolute immunity under *Hoover*. App. A28. Arguing that *Midcal* only applied to claims of immunity by private actors invoking state law as a defense, not to the immunity of state actors themselves, the court concluded that, under *Hoover*, the state "is immune from antitrust liability, regardless of whether the restraint in question would satisfy the *Midcal* test." App. A27-A28.

The court recognized that there was a split on this issue, with the Second and Third Circuits applying the *Midcal* test to reject a claim of *Parker* immunity, and two district courts declining to apply the *Midcal* test and finding immunity under *Hoover*. App. A24 (comparing *Freedom Holdings*, 357 F.3d at 226-32 (applying *Midcal* test) *and Bedell*, 263 F.3d at 259-65 (same) *with PTI, Inc.* v. *Philip Morris, Inc.*, 100 F. Supp.2d 1179, 1195-96 (C.D. Cal. 2000) (rejecting application of *Midcal*) *and S & M Brands, Inc.* v. *Summers*, 393 F. Supp.2d 604, 621-29 (M.D. Tenn. 2005) (same)). The court further expressly rejected the Third Circuit's conclusion in *Bedell* that the MSA was a "hybrid restraint" that failed the *Midcal* test for *Parker* immunity. App. A28-A29 (quoting *Bedell*, 263 F.3d at 258). Relying on its earlier conclusion that the MSA did not delegate any *per se* illegal power "such as the ability to fix prices," the court concluded that "the MSA cannot be classified as a hybrid restraint." App. A30. The court noted its agreement with the Sixth Circuit's similar holding that the MSA scheme was not a hybrid restraint. App. A30 n. 10 (citing *Tritent*, 467 F.3d at 558).

Based on those various holdings, the court thus affirmed the district court's judgment of dismissal.

7. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This Court should grant the current petition for a writ of certiorari because it presents important issues upon which the circuits are divided. The issues involve a settlement agreement affecting nearly all of the States, millions of consumers, and billions of dol-

lars annually. More generally, the divergent views in the courts of appeals on the scope of *Parker* and *Noerr-Pennington* immunity create considerable uncertainty regarding the antitrust laws in all areas where the States may indirectly facilitate or sanction private anticompetitive schemes, and alters the federalism balance between the federal government and the States acting in concert on matters that affect the entire national economy, not merely the local economy of a particular State.

I. There Is an Extended Split on the Questions Presented.

As the Ninth Circuit repeatedly recognized, the decision below expands a split among the federal courts of appeals on several issues relating to antitrust immunity.

A. The Decision Below Expands the Split on Whether State Statutes Implementing the MSA Are Preempted by Federal Antitrust Law.

The decision below expands an existing split between the Sixth and Second Circuits over whether the MSA and its related statutes are preempted by federal antitrust law. The Ninth Circuit, joining the Sixth, holds that because such statutes do not necessarily mandate or authorize illegal activity "in all cases," they are not preempted. App. A13-A14; *Trident*, 467 F.3d at 557-58.

The Second Circuit, by contrast, has held that because the underlying arrangement among the tobacco companies "would be a *per se* violation because it is a naked restraint on competition," and because the implementing statutes serve to enforce that arrangement and threaten to bolster the scheme into "a per-

manent, nationwide cartel," the statutes are preempted. *Freedom Holdings I*, 357 F.3d at 226.

Both the Sixth and the Ninth Circuits acknowledge the earlier Second Circuit decision and expressly reject its reasoning, App. A14 n. 7; *Tritent*, 467 F.3d at 557-58, making the split both conscious and unlikely to be reconciled without intervention by this Court. The Second Circuit, for its part, denied rehearing and rehearing *en banc* in *Freedom Holdings I*, and issued a further panel opinion in support of the denial of rehearing rejecting a variety of additional arguments by the state defendants. *Freedom Holdings, Inc.* v. *Spitzer*, 363 F.3d 149 (CA2 2004) ("*Freedom Holdings II*"). Since that time the Second Circuit has shown no sign of retreating from its views, and has even allowed a suit challenging the MSA to go forward against 31 state attorneys general, finding personal jurisdiction against them in New York, as the place where they negotiated parts of the MSA and the model Escrow statute. *Grand River Enterprises Six Nations, Ltd.* v. *Pryor*, 425 F.3d 158, 166 (CA2 2005), *cert. denied*, 17 S. Ct. 379 (2006). Rather than reconsidering its position, the Second Circuit is poised to extend it to cover the operation of the MSA in 31 different States.

Accordingly, no benefit would be derived from further delay in resolving the intractable division among the courts of appeals on the validity of the MSA and its implementing legislation. The underlying legal disputes have been well-aired in the conflicting decisions of the Second, Sixth and Ninth Circuits. Future courts will simply pick sides. Moreover, as the decision in *Grand River Enterprises Six Nations* illus-

trates, there exists a real possibility that different circuits will be called upon to pass on the validity of the same state implementing laws, inevitably resulting in conflicting judgments on the validity of the same state laws. Only this Court can resolve the current conflict and avoid that impending chaos.

B. The Decision Below Expands A Split on Whether the Noerr-Pennington *Doctrine, Standing Alone, Immunizes Private Actors for the Anti-Competitive Results of their Petitioning Activity, as Opposed to Merely for the Petitioning Activity Itself.*

The decision below also contributed to growing conflict and confusion over the scope of the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine generally entitles private parties to seek from the government a law that would restrain trade. On that point there is general agreement. But the question then arises whether, having successfully lobbied for a restraint on trade, a defendant automatically enjoys *Noerr-Pennington* immunity for actions it takes under the authority of that newly enacted state law, or whether the legality of the defendant's conduct is to be judged, instead, under the standards set forth in the *Parker* and its progeny.

In this case, the court of appeals concluded that the question is governed by *Noerr-Pennington* and that a defendant who lobbied for a government restraint on trade is absolutely immune for engaging in anticompetitive conduct authorized by the resulting legislation (and, in this case, settlement agreement). Under that view, it is unnecessary to decide whether

the law is pre-empted under *Midcal* or protected by *Parker*. App. A30 n. 11.

In adopting the same view, the Third Circuit has held that even though the MSA regime does not qualify for *Parker* immunity (because the states do not sufficiently supervise the anticompetitive conduct undertaken pursuant to the settlement), defendants acting under the MSA are nonetheless immune under the *Noerr-Pennington* because the legislation is the result of protected petitioning.[5]

Both this Court and the Second Circuit, however, have properly understood the *Noerr-Pennington* doctrine to extend only to the petitioning activity itself, with the *results* of such petitioning activity evaluated under the *Parker* and *Midcal* tests. The Second Circuit, for example, held in *Freedom Holdings I* that MSA implementing statutes are not entitled to *Noerr-Pennington* protection, notwithstanding that the

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[5] *Bedell*, 263 F.3d at 251-52 ("the petitioner is immune from antitrust liability whether or not the injuries are caused by the act of petitioning or are caused by government action which results from the petitioning"; agreeing with the district court that "defendants engaged in petitioning activity with sovereign states and are immune under the *Noerr-Pennington* doctrine"); *id.* at 258(finding that "just as the injury in *Midcal* was caused by private parties taking advantage of the state imposed market structure, the anticompetitive injury here resulted from the tobacco companies' conduct after implementation of the Multistate Settlement Agreement, and not from any further positive action by the States";); *id.* at 266 (finding that the States "fail the second prong [of the *Midcal* test] requiring them to actively supervise the anticompetitive restraints causing injury. Because private participants in state action enjoy *Parker* immunity only to the extent the States enjoy immunity, the defendants are not shielded by *Parker*.").

MSA may have been the result of protected petitioning, because the resulting legislation failed the *Parker* and *Midcal* tests and, thus, was pre-empted. *See* 357 F.3d at 233 ("[T]he immunity for advocacy cannot sensibly protect the resultant anticompetitive legislation from being held to be preempted as in conflict with the Sherman Act. Otherwise, all such legislation would be immune."); *id.* ("The end product of regulatory legislation can take many forms, some preempted, some not. * * * [Protecting the right to petition] does not, however, protect the ultimate legislative result from Supremacy Clause analysis.").

A plurality of this Court in *Cantor* similarly held that *Noerr*

> did not involve any question of either liability or exemption for private action taken in compliance with state law. * * * [N]othing in the *Noerr* opinion implies that the mere fact that a * * * regulatory agency may approve a proposal * * * is a sufficient reason for conferring antitrust immunity on the proposed conduct.

428 U.S. at 601-02. *See also* 1 Areeda & Hovenkamp, ANTITRUST LAW ¶ 229, at 40 ("*Noerr* protects the petitioning process from antitrust liability, but it does not protect all the results of such petitioning."); *id.* at 40-41 (noting that the wine producers in *Midcal* had petitioned the State for the restrictions in that case, yet the resulting law failed to qualify for state-action immunity and therefore could not immunize the subsequent unsupervised conduct under that law).

By expanding the scope of *Noerr-Pennington* immunity to reach subsequent law and conduct properly analyzed under the *Parker* and *Midcal* state-action

doctrines, the decision below diverges from the holdings of this Court and the Second Circuit in a manner that threatens to undermine the coherent application of both forms of immunity.

C. *The Decision Below Expands the Split on Whether a State Scheme, Enabling Private Antitrust Violations, that Fails the* Midcal *Test Nonetheless Receives* Parker *Immunity.*

In holding that the MSA and its implementing legislation need not be analyzed under the *Midcal* test, the Ninth Circuit acknowledged that it was rejecting the contrary holdings of the Second and Third Circuits, which not only *applied* the *Midcal* test to the MSA and the implementing statutes, but held that the MSA and those statutes *failed* the *Midcal* test and thus were not entitled to *Parker* immunity. App. A28-A29 (rejecting *Midcal* application and analysis in *Freedom Holdings* and *Bedell*). The Ninth Circuit instead joined the holdings of the Sixth Circuit and two district courts in finding that the MSA and its implementing statutes were entitled to immunity without regard to the *Midcal* analysis. App. A24, A30 n. 10 (citing *PTI*, 100 F. Supp.2d at 1195-96; *S&M Brands*, 393 F. Supp.2d at 621-29; and *Tritent*, 467 F.3d at 558).

In *Freedom Holdings I*, however, the Second Circuit correctly recognized that the scheme implemented by the MSA is a "hybrid restraint," not merely a unilateral act by the State. 357 F.3d at 223. The court noted that, unlike laws whereby the State affirmatively and directly regulates or requires private anticompetitive conduct, the "Contraband Statutes allegedly enforce an express market-sharing

agreement among private tobacco manufacturers, the MSA. As alleged in the complaint, the Contraband Statutes are the result of the incentives created by the MSA for the States," and the MSA, in addition to being "an agreement involving the State of New York, * * * also was by any definition a 'contract' that the four major tobacco manufacturers jointly negotiated among themselves." *Id.* at 224. The court thus found that the *Midcal* analysis applied to such a hybrid restraint and that the MSA scheme failed such analysis due to lack of state supervision of the ensuing private anticompetitive behavior. *Id.* at 226, 231-32.

Similarly in *Bedell*, the Third Circuit recognized that "just as the injury in *Midcal* was caused by private parties taking advantage of the state imposed market structure, the anticompetitive injury here resulted from the tobacco companies' conduct after implementation of the [MSA], and not from any further positive action by the States. Even though, as defendants argue, the [MSA] created the cartel, this fact makes the case analogous to *Midcal,* not different." 263 F.3d at 258. The *Bedell* court further concluded that the MSA scheme failed the *Midcal* analysis because the States "lack oversight or authority over the tobacco manufacturers' prices and production levels. These decisions are left entirely to the private actors. Nothing in the [MSA] or its [Escrow] Statutes gives the States authority to object if the tobacco companies raise their prices." *Id.* at 264.

Having expressly considered and rejected the contrary holdings of the Second and Third Circuits, and allied itself with the Sixth Circuit, the court below expanded the existing split on the applicability of the

Midcal analysis to the MSA and its implementing legislation and, more generally, on the applicability of the *Midcal* analysis to any anticompetitive scheme that is implemented, in part or in whole, through state legislation.

II. The Circuit Split Implicates Recurring Questions of National Importance.

This case presents issues of national importance that should be resolved by this Court for a number of reasons.

1. The validity of the MSA, its implementing legislation, and the conduct of the tobacco companies thereunder is a question of great practical importance and recurring litigation.[6] The continuing uncertainty

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[6] *See Tritent Int'l Corp.* v. *Kentucky*, 467 F.3d 547 (CA6 2006); *Xcaliber Int'l Ltd.* v. *Foti*, 442 F.3d 233 (CA5 2006); *Grand River Enterprises Six Nations, Ltd.* v. *Pryor*, 425 F.3d 158, 166 (CA2 2005), *cert. denied*, 17 S. Ct. 379 (2006); *Freedom Holdings, Inc.* v. *Spitzer*, 357 F.3d 205 (CA2), *reh'g denied*, 363 F.3d 149 (2004); *Mariana* v. *Fisher*, 338 F.3d 189 (CA3 2003), *cert. denied*, 540 U.S. 1179 (2004); *A.D. Bedell Wholesale Co.* v. *Philip Morris, Inc.*, 263 F.3d 239 (CA3 2001), *cert. denied*, 534 U.S. 1081 (2002); *Xcaliber Int'l Ltd.* v. *Kline*, No. 05-2261-JWL, 2006 WL 288705 (D. Kan. Feb.7, 2006); *Xcaliber Int'l Ltd.* v. *Edmondson*, No. 04-CV-0922-CVE-PJC, 2005 WL 3766933 (N.D. Okla. Dec.13, 2005); *S & M Brands, Inc.* v. *Summers*, 393 F. Supp.2d 604 (M.D. Tenn. 2005); *PTI, Inc.* v. *Philip Morris, Inc.*, 100 F. Supp.2d 1179 (C.D. Cal. 2000); *Forces Action Project LLC* v. *California*, 2000 WL 20977 (N.D. Cal. 2000) (No. C99-0607 MJJ), *aff'd in part*, 16 Fed. Appx. 774 (CA9 2001) (unpublished); *Premium Tobacco* v. *Fisher*, 51 F. Supp.2d 1099 (D. Colo.1999); *Hise* v. *Philip Morris, Inc.*, 46 F.Supp.2d 1201 (N.D. Okla. 1999), *aff'd mem.*, 208 F.3d 226, 2000 WL 192892 (CA10 2000) (unpublished); *A.B. Coker Co.* v. *Foti*, No. 05-1372 (W.D. La.).

Much of that litigation raises antitrust issues, and even the various constitutional claims being raised, for example under

regarding the legality of the scheme is harmful to all involved. States, in particular, have come to rely on the billions of dollars in funding generated. *See generally* United States General Accounting Office, *Tobacco Settlement: States' Use of Master Settlement Agreement Payments* (June 2001). The continuing unsettled legality of the MSA's funding mechanisms generates harmful uncertainty in state budgeting. At the same time, companies subject to the MSA, or its competitive consequences, face the same uncertainty as they attempt to plan for future operations and investments, a result harmful to both the industry and consumers alike.

Indeed, the States themselves have noted the uncertainty caused by the split over antitrust immunity in a petition to this Court seeking review of the Second Circuit's assertion of jurisdiction over an antitrust claim against 31 state attorney's general. *See* Petition for Writ of Certiorari of State Attorneys General, No. 05-1343, 2006 WL 1049019 (Apr. 18, 2008), seeking review of *Grand River Enterprises Six Nations, Ltd.* v. *Pryor*, 425 F.3d 158 (CA2 2005), *cert. denied*, 17 S. Ct. 379 (2006). In that petition, the Attorney Generals complained that "so long as the Second Circuit's decision stands, petitioners will be denied the certainty and finality that ordinarily results from decisions rendered by federal courts (particularly federal courts of appeals) in their respective States." 2006 WL 1049019, at *14-*15. While this Court, in accordance with its general practice of denying review of interlocutory appeals, denied certiorari

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the Commerce Clause, overlap and interact with the antitrust issues raised.

as to the personal jurisdiction question in *Grand River*, it can resolve much of the States' uncertainty by addressing the substance of the immunity issues in this case (here on final judgment) and providing a uniform national answer.

Moreover, the delay in conclusively resolving the legality of the MSA's anticompetitive effects, and defendants' conduct under it, is prejudicial to consumers who, if petitioner and the Second Circuit are right, are paying billions of dollars in illegally inflated prices every year and foregoing the benefits of the competitive market Congress intended the antitrust laws to encourage. Regardless what this Court might think about the choice to purchase and smoke cigarettes, it remains the case that cigarettes are a legal product whose marketing and sale are subject to the antitrust laws. The strong federal antitrust policy against market division and price-inflating schemes such as this one calls for this Court's intervention to resolve the uncertainty over whether such added costs are being lawfully imposed on consumers. *Cf. Topco*, 405 U.S. at 610 ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.").

2. This case also implicates broader questions of national importance as well. Even setting aside the inherent importance of the legality of the MSA and the anticompetitive conduct that grew out of that agreement, the questions presented here are of general importance to the proper implementation of anti-

trust law generally. As this Court's numerous cases applying *Midcal* demonstrate, industries often successfully petition States to adopt anticompetitive laws that may or may not serve State interests or involve adequate State supervision. *See, e.g., FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987); *Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986). And circuit and district cases applying *Midcal* to various state laws are too numerous to catalogue.

The court of appeals nonetheless questioned whether *Midcal* remains a "'live' precedent[,]" after *Hoover*, App. A24, and reached a holding that essentially renders that decision a dead letter in most circumstance. Under the Ninth Circuit's approach even if a state law fails scrutiny under *Midcal*, (and therefore, would otherwise be pre-empted), the law and the private conduct thereunder, are nonetheless immune from all challenge – the law is subject to *Parker* protection because it was enacted by the State (whether it meets the *Midcal* criteria or not); and the private conduct is immunized under *Noerr-Pennington* (even if the resulting law is invalid under *Midcal*) because, like all legislation, the otherwise invalid state law was the subject of lobbying by the benefitted group. The range and variety of private schemes that might thus receive the thin cover of State adoption is limited only by the imagination of those who would petition the States for such arrangements.

If *Midcal* is to be overruled, it should be by this Court. As the Ninth Circuit noted, the continued uncertainty as to the validity of *Midcal* and its relationship to *Hoover*, has been a source of confusion in the

lower courts for many years. App. A24. Only this Court can resolve that confusion and restore coherence to the nation's antitrust law.

3. The issues in this case are important for the further reason that the manner in which the States have participated in the MSA – through a multi-state agreement among themselves and the tobacco companies and through coordinated legislation pursuant to that agreement – has serious federalism implications that are themselves of national concern and that are in severe tension with the underpinnings of the *Parker* immunity doctrine. This is not merely a case involving a single State choosing a different economic model for itself, and choosing to forgo competition within its own boundaries. Rather, it involves the combined and coordinated activities of 46 States that impact the nationwide market for cigarettes.

Such coordinated state support for a private anticompetitive scheme seems to fall well outside the federalism values protected by *Parker* immunity doctrine and in fact implicates the precise opposite side of the federalism equation by encroaching upon national authority over a national market. Cf. U.S. Const., art. I, sec. 10 ("No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State."); *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978) (Compact Clause prohibits States from forming, without congressional consent, "'any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States'") (quoting

Virginia v. *Tennessee*, 148 U.S. 503, 519 (1893)). Indeed.

The expansion of antitrust immunity, in the service of a scheme resulting from the a combination among 46 States and the tobacco companies, seems at best an aggressive application of court-made, federalism-based, immunity doctrines and thus warrants closer attention by this Court and its supervision over the application of the doctrines it has created.

III. The Decision Below Improperly Expands Antitrust Immunity Contrary to the Decisions of this Court.

Certiorari is further warranted because the decision below was wrong and in direct conflict with the decisions of this Court.

1. Regarding questions of preemption, the Ninth Circuit erroneously applied the standards for a pre-implementation facial challenge to a statute used by this Court in *Rice* to an as-applied post-implementation challenge to the actual operation of the MSA and its related statutes, a scenario that *Rice* expressly distinguished. *See* 458 U.S. at 658 n. 4 ("[B]ecause respondents brought this suit prior to the effective date of the statute, respondents did not, and could not, challenge any vertical restraints actually employed by a distiller pursuant to the statute. Instead, respondents challenge the statute on its face without consideration of particular circumstances."); *id.* at 661 (applying narrower test for preemption to "a state statute, when considered in the abstract"). Of course, this case does not involve any "abstract" consideration of the MSA and its statutes, but rather

allegations going to the actual operation and effect of that scheme and the private conduct facilitated thereby. Under such circumstances, the approach of the Second Circuit in *Freedom Holdings I* is the appropriate course, and the court should have looked to, and allowed proof of, the "economic realities of the relevant transactions," *United States* v. *Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 208 (1968), not merely the hypothetical possibilities that competition might slip through the structure set up by the MSA.

Furthermore, the Ninth Circuit was incorrect in concluding that the MSA and related statutes were mere unilateral state conduct rather than hybrid restraints not entitled to absolute immunity. As described by the Second Circuit, discussed *supra*, at 25-26, the MSA and the related statutes were not simply unilateral state action, they were the result of an *agreement* with and among the major tobacco companies, which agreement effectively coerced state legislatures to adopt the statutes provided for in MSA. That is a classic instance of a hybrid restraint rather than unilateral regulation, and places more in the states in the role of a partner in the agreement, not a sovereign regulator of its subjects. And in that role, the states left the OPMs free to make marketing decisions regarding price increases without supervision, merely enforcing those decisions and insulating the OPMs from the competitive consequences of whatever decisions they collectively made. In order to survive, such a scheme must pass scrutiny under *Midcal*, not merely the blithe assertion that the MSA and its related laws are purely "sovereign" acts.

2. Regarding the *Noerr-Pennington* doctrine, the Ninth Circuit's extension of such First-Amendment-based immunity to ensuing conduct, rather than limiting it to the petitioning activity itself, badly confuses *Noerr-Pennington* immunity with *Parker* state-action immunity, and threatens to render *Midcal* and its progeny meaningless. As described by the Second Circuit, this Court, and the leading treatise on antitrust law, *see supra* at 23-24, merely petitioning for a law does not ensure that such law is entitled to state-action immunity. While anyone may request a potentially invalid law, the mere act of requesting it does not entitle either the State or the requesting party to have that law, and conduct thereunder, immunized from its substantive defects. Indeed, under the Ninth Circuit's approach, *Midcal* itself would have come out differently, and the doctrine therein would be of no continuing use.

A proper understanding of *Noerr-Pennington* immunity extends it only to the petitioning activity itself. Any resulting restraint adopted by the government, and any subsequent private conduct pursuant to that restraint, must be analyzed under the state-action doctrine.

3. Finally, regarding the court's refusal to apply *Midcal* to the state-action immunity question, the court erred for much the same reasons that it erred in its preemption analysis. As already discussed, this case involves, at best, a hybrid restraint subject to *Midcal*. Indeed, the decision by the State Attorney General to enter into the MSA in the first place more closely resembles that officer attempting to make the state "a participant in a private agreement or combi-

nation by others for restraint of trade," *Parker*, 317 U.S. at 351-52, than it does a "sovereign" state act. Indeed, the Attorney General's conduct in agreeing to the MSA would not seem to be a sovereign act at all, but rather the non-sovereign act of a state agent. This Court has only recognized direct sovereign acts of the state in the conduct of the legislature and in the "*legislative*" activities of a state supreme court. *Hoover*, 466 U.S. at 568 (emphasis added). If only the legislative, not the judicial, conduct of a state Supreme Court is considered sovereign state action, than the litigation and contracting activities of a state executive officer would seem to fall far short of the mark.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

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